Supreme Court, U.S.
FILED

No. 01 1688 OCT 23 2001

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# In The Supreme Court of the United States

**GEORGE W. FRIDAY and PAULETTE D. FRIDAY,**

*Petitioners,*

**v.**

**WHITTLE AND ROPER REAL ESTATE FIRM, THELMA BATTS, MARY WATKO and BEN S. BOOTH,**

*Respondents.*

**On Petition for Writ of Certiorari to the Supreme Court of Virginia**

## PETITION FOR WRIT OF CERTIORARI

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71 pg

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## QUESTIONS PRESENTED FOR REVIEW

### I. FIRST QUESTION PRESENTED

A Federal Question exists, and there is a conflict by a state court. The first such interest is the importance of assuring that a defendant has a power of attorney, and should a defendant be permitted to act in the stead of another, without legal authorization of the law?

### II. SECOND QUESTION PRESENTED

The issue presented in this appeal presents an important question as to a buyer's rights on improper delivery in accordance with the Virginia State Law. Transferred of Real Estate Property without the knowledge of the petitioners.

### III. THIRD QUESTION PRESENTED

This issue in this appeal presents an important question as to how under Federal Law a state court determines a violation of the Plaintiff's claim to "Constructive Fraud".

### IV. FOURTH QUESTION PRESENTED

This issue in this appeal presents an important question as to how under Federal Law a trial court determines a violation of the Plaintiff's Due Process Constitutional Rights in determining whether or not to grant a new trial in equating to "Wanton Acts". Another question of importance is can a state court disregard the finding of Department of Professional and Occupational Regulation?

## PARTIES TO THE PROCEEDING

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**RECORD NO.**

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**In the**
**Supreme Court of the United States**

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George W. Friday, and Paulette D. Friday.....Petitioner

v.

Whittle and Roper Real Estate Firm
Thelma Batts, Mary Watko and Ben S. Booth.....Respondents

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Petition for Writ of Certiorari to the
Supreme Court of Virginia

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Petitioners George W. Friday, and Paulette D. Friday, respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

## OPINION BELOW

The opinion of the Supreme Court of Virginia is unpublished and appears in Appendix A to this Petition. The Order of the Prince George Circuit Court, Prince George, Virginia is also reported and appears in Appendix B to this Petition.

## JURISDICTION

The opinion and judgment of the Supreme Court of Virginia was entered on July 27, 2001. This Petition for a Writ of Certiorari is filed within ninety (90) days of that date. The Court's jurisdiction is invoked under Title 28 U.S.C. Sect. 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and Statutory Provisions are involved in this case: The 14th Amendment, the Due Process Clause and the Equal Protection Clause of the United States Constitution, Title 42, U.S.C. Sect. 1981, Number 122 Civil Rights Violation. Title 42 U.S.C. Sect. 1981 Number 76-Full and equal benefit of all laws. Commonwealth of Virginia Department of Professional and Occupational Regulation. Title 8.2-401 of Virginia Code imposes obligations. Title 11-79.2 and 8.2-501, (Misrepresentations Prohibited).

## STATEMENT OF THE CASE

This is a case involving the sale of real property. On April 2, 1998, Petitioners, George W. Friday and Paulette D. Friday (the "Fridays" or the "Buyers") entered into a contract with Thelma Watko Batts ("Batts" or the "Seller") to purchase a tract of land specifically identified in the contract as "Whalen Tract Seven" located in Disputanta, Virginia. According to record at the time the contract was entered into, Whalen Tract Seven encompassed 5.03 acres of land. The Fridays signed an agreement of dual agency, whereby the seller's agent, Ben S. Booth ("Booth"), would also serve as their agent in the transfer

of property.

Although Batts signed the contract, she did not own the property. Nor did she have a "Power of Attorney" to act in stead of the owner. The property was actually in the name of Mary F. Watko ("Watko"). After the contract between Batts and the Fridays was executed, Watko transferred 1.5 acres of Whalen Tract Seven to Batts, and also granted an easement on one side of the property to another grantee. The Fridays were not informed of this transfer.

After the contract was executed, the Fridays moved onto the property three days before closing was to occur pursuant to a written agreement with Batts. At the time of closing, the Fridays discovered that Watko intended to sell only a partial tract of Whalen Tract Seven encompassing approximately 3.5 acres, as opposed to 5.03 acres, which was the acreage of the entire tract. The Fridays refused to go forward with the closing because of fraudulent in the purchase agreement contract. The closing never took place. The Fridays remained on the property, paying a per diem rent to Batts until 1999, when Watko and Batts illegally evicted them.

The Fridays brought an action in equity in the General District Court of Prince George County against Whittle and Roper Real Estate Firm, Ben S. Booth, Thelma Batts and Mary Watko. The Fridays filed another lawsuit of that action in the Circuit Court of Prince George County on the basis of fraud, breach of contract and intentional infliction of emotional distress. They sought compensatory and punitive damages. Batts and Watko filed a counterclaim in which they sought damages from the Fridays for, inter alia, mortgage payments made from 1998 through 2000 and attorney's fees. The Fridays were not in default of their duties and responsibilities. A jury trial was held before the Honorable James A. Luke on October

23 and 24, 2000. During the trial, the trial judge refused to allow the Fridays to present evidence in support of Mr. Friday's claim of intentional infliction of emotional distress, and struck their punitive damages claim. Mr. Friday is a 100 percent Disabled American Veteran, who has been diagnosed with "Bipolar Disorder". Prior to the trial Mr. Friday was hospitalized on three occasions. The case was submitted to the jury only on the breach of contract claim against each of the defendants.

On October 24, 2000, the jury returned a verdict in favor of the defendants, and awarded Batts and Watko $15,8000.00 on their counterclaim. Mr. Fridays discovered as the jurors were leaving the courtroom that he know one of the jurors and that he had had an altercation with that juror on two previous occasions. The Fridays moved for a mistrial. After a hearing on December 11, 2000, the trial judge refused to grant the Fridays' motion. The final order was entered on December 12, 2000. The Fridays now petition this court (The Supreme Court of Virginia) for an appeal of the trial judge's decisions.

## STATEMENT OF THE FACTS

In searching for a larger home for his family, Mr. Friday came upon an advertisement for the sale of a home located at 6651 West Quaker Road in Disputanta, Virginia. They learned from the advertisement that the owner was asking $212,000.00 for the property. Mr. Friday contacted the listing agent, Booth, and set up a time to view the property.

The Fridays met with Booth at the property for the first time on March 13, 1998. (October 23 Transcript, pp. 194-196). He saw no stakes on the property. (October 23 Transcript, p. 198). No one called his attention to any stake or marker.

(October 23 Transcript, p. 198). When he returned to the property on April 2, 1998, he did not see any surveyor marks or stakes on the property. (October 23 Transcript p. 199). He and Booth never discussed the size of the property, other than to refer to it as Whalen Tract Seven. (October 23 Transcript, p. 200). Friday asked Booth about the conflict in the advertisement which stated 3.5 acres and the purchase documents which stated Whalen Tract Seven. Booth told him not to worry about it, just to "worry about Whalen Tract Seven". (October 23 Transcript, p. 203).

The Fridays made an offer on the property which was rejected. The owner came back with another offer, and the Fridays made a second offer. (October 23 Transcript, p. 204). The first offer was made in March of 1998. (October 23 Transcript, p. 204). The final sales agreement was executed on April 2, 1998, as well as a standard clause addendum with a $500.00 deposit. (October 23 Transcript, pp. 205-206). The Fridays immediately applied for a loan. (October 23 Transcript, pp. 208-209).

The Fridays obtained financing through First Advantage Federal Credit Union. (October 23 Transcript, p. 93). The purpose of the loan was to obtain a home mortgage loan. They were requesting a loan in the amount of $195,000.00. (October 23 Transcript, p. 93). The physical address of the property was 6651 West Quaker Road. The legal description received was Map Book P, page and grid no. 18K4 Whalen Tract Seven. (October 23 Transcript, p. 93).

Ms. Brown, the loan officer testified that, for the purposes of determining whether a loan will be granted or denied, she considers both the street address and the legal description. (October 23 Transcript, p. 94). She stated that the loan depended on the acreage and the appraised or assessed

value of Whalen Tract Seven (October 23 Transcript, p. 94). Approval is based on the applicant's credit history, income and the property itself. (October 23 Transcript, p. 94). An appraisal is ordered and sent to the Veteran Administration HQ, Roanoke, Virginia. Their underwriters issue a certificate of reasonable value and that appraisal is sent back to Ms. Brown. Once that appraisal is approved by the VA as an acceptable appraisal, the underwriters to the credit part alone. (October 23 Transcript, p. 95). Ms. Brown relied on the uniform residential appraisal report that she received as the basis for approval of the loan. (October 23 Transcript, p. 103). Brown noted that the appraisal must have been accepted by the VA to guarantee the loan. (October 23 Transcript, p. 103). She decided to grant the loan, and it was granted at a locked-in interest rate of 6.5 percent for 60 days (October 23 Transcript, p. 104). It expired on July 15, 1998. This was the date of the termination of the 6.5 percent loan. (October 23 Transcript, p. 104). The monthly payment on the loan would have been $1,232.53, which includes both principal and interest. (October 23 Transcript, p. 107). The loan package was then sent to the closing attorney. (October 23 Transcript, p. 108).

The Fridays were unaware that a surveyor by the mane of George Whitman ("Whitman") surveyed the property on April 2, 1998. (October 23 Transcript, p. 70). The survey was requested by Thelma Batts, a defendant who did not own the home on March 26, 1998. (October 23 Transcript, p. 70). (Plaintiff's Exhibit 1 - plat). He conducted a second survey on July 1, 1998, at the request of Ben S. Booth, the Realtor in this case. (October 23 Transcript, p. 72). That survey was conducted on July 1, 1998. (October 23 Transcript, p. 73). The first survey was performed for the division of 1.5 acres of Whalen Tract Seven. The second survey was to survey the

remaining 3.5 acres. (October 23 Transcript, p. 73).

When Whitman performed the second survey, he included a 25 foot easement which is part of the 50 foot right of way coming into the property on the west side. (October 23 Transcript, p. 75). He also showed an easement on the east side of the property. This was a variable width easement which was 14 feet in width on one end, and 20 feet in width on the other. (October 23 Transcript, p. 75). The easement was shown on a previous survey in Deed Book 324 at page 726 or 728 which was performed by Michael Bristow on December 21, 1989, on the east side of the property. (October 23 Transcript, p. 76). That survey also showed the same 50 foot right of way on the west side of the property. (October 23 Transcript, p. 77). He found the easements to be still in place and still being used and duplicated that by the same information that was on the same survey. (October 23 Transcript, p. 77). He performed field measurements. He went to the assessors' office and obtained a copy of the tax map. (October 23 Transcript, p. 77). The tax map records individual tax cards. The tax cards show whose name the property is in and provides the deed book or plat book reference. This leads to the correct deed book in the clerk's office. (October 23 Transcript, p. 78).

Once he obtained the information from the tax office, Whitman went to the record room at the clerk's office where the recorded plats and deeds are located. (October 23 Transcript, p. 79). He found a deed of gift dated October 25, between Ms. Jolly and Ms. Mary F. Watko. (October 23 Transcript, p. 79). The deed conveyed Whalen Tract Seven to Ms. Watko. (October 23 Transcript, p. 79). The deed describes that partial as containing 5.03 acres of land. (October 23 Transcript, p. 79). The deed also provided a legal description. It gives a location of the property on Route 629. It refers to the

frontage as 331 feet. It refers to it by house number as 6651 West Quaker Road in Disputanta, Virginia. It refers to the acreage as 5.03 and it refers to it being designated as lot seven on a certain plan entitled division of an 89.14 acre tract. (October 23 Transcript, p. 80).

Mary Watko testified that in October of 1993, Whalen Tract Seven was placed in her name by deed of gift. (October 23 Transcript, p. 112). The property remained-in her name by deed of gift. (October 23 Transcript, p. 112). The property remained in her name in the beginning of 1998. (October 23 Transcript, p. 113).

The MLS sheet provided to the Fridays by booth at the time of their first meeting listed the property as Whalen Tract Seven which consisted of 5.03 acreage. (October 23 Transcript, p. 131). Mr. Booth, a realtor for Whittle and Roper Firm did not check the tax records, nor did he go to the clerk's office to verify the information by Ms. Batts. (October 23 Transcript, p. 134). He also obtained information from another agent who had listed the property. (October 23 Transcript, p. 134). Mr. Booth never checked to determine who the record owner of the property was. (October 23 Transcript, p. 135). Mr. Booth never checked to determine how many acres were included in Whalen Tract Seven. (October 23 Transcript, p. 137). He went to the property and saw stakes along the property, but he does not know who placed them there. (October 23 Transcript, p. 139). Ms. Batts told him that they represented the property line and he placed yellow tape on the stakes. (October 23 Transcript, p. 140). Mr. Booth never reviewed the plat or survey to determine the accuracy of the placement of the stakes. (October 23 Transcript, p. 140). During his walk-through of the property with the Fridays, Mr. Booth did not tell them that Ms. Batts wanted to divide up

Whalen Tract Seven. (October 23 Transcript, p. 144).

Mr. Booth assisted in taking the deed of easement and deed of gift to the courthouse to be recorded on April 10, 1998. Mr. Booth and Ms. Thelma Batts concocted, conspired and collaborated to deceive the Fridays. (October 23 Transcript, p. 145). Mr. Booth testified that when he showed the Fridays the property for the first time, he believed that the division had already been accomplished. Mr. Booth indicated that he discovered thereafter that it had not. Mr. Booth testified that Ms. Batts did not want to sign a contract until the deed of easement and deed of gift of the back parcel had been done. Mr. Booth suggested an attorney by the name of Mr. Rainey, and Ms. Batts met with him and drew up the necessary documents. Mr. Booth then recorded them on April 10, 1998, after the Fridays had already signed the contract. (October 23 Transcript, p. 147). Mr. Booth dd not give the Fridays notice that he was recording these documents, despite the fact that he was serving as a dual agent at the time. (October 23 Transcript, pp. 147-148). The dual agency agreement was signed on April 2, 1998, as were the contracts. (October 23 Transcript, p. 149).

At the end of April 1998, Mr. Booth faxed copies of the contract and addendum to the lender. (October 23 Transcript, p. 160). Mr. Booth did not inform the lender that a portion of Whalen Tract Seven had been deeded to another person. (October 23 Transcript, p. 168). Mr. Booth did not inform the lender that there was a new deed of easement recorded on April 10, 1998. (October 23 Transcript, p. 168). Mr. Booth testified that he did not tell the Fridays about the deeds because there was an asphalt driveway on two sides of the property and a row of pine trees on the back of the property. (October 23 Transcript, p. 189).

The closing on Whelan Tract Seven was scheduled for

July 9, 1998. (October 23 Transcript, p. 210). The closing did not occur, however, because of the conflict between the purchase agreement contract, fraud and the advertising for the property. (October 23 Transcript, p. 211). They remained on the property because they had spent so much money moving to the new home and they had rented their previous home in Petersburg, Virginia. (October 23 Transcript, p. 211-216). The Fridays paid $12,091.00 in rent while they remained on the property. (October 23 Transcript, p. 229).

Out of the presence of the jury, the Fridays presented evidence of Mr. Friday's physical and mental health. Mr. Friday testified that he has an enlarged heart, and he has had this cardiac problem for 14 years. (October 23 Transcript, p. 250). He continues to see a cardiac physician for this condition. (October 23 Transcript, p. 251). Prior to 1998, he has been treated for emotional problems including bipolar disorder. He was diagnosed with bipolar disorder, which led to his medical retirement after 14 years from the United States Army. (October 23 Transcript, p. 252). He takes four separate types of medication for his bipolar disorder. (October 23 Transcript, p. 253). He has been seeing a physician at the VA Medical Center and group therapist. (October 23 Transcript, p. 254). Prior to 1998, he was individual therapy once a month. Since 1998, however, he has been in group therapy on a weekly basis. (October 23 Transcript, p. 254). He has been hospitalized several times his bipolar disorder, beginning on May 11, 1999, at the McGuire VA Medical Center, Richmond, Virginia, again in July of 1999 at McGuire VA Medical Center, again in September of 1999 at Walter Reed Medical Center in Washington, DC. He had been hospitalized for this condition on one prior occasion in 1991 at the VA Medical Center in Salem, Virginia. (October 23 Transcript, pp. 255-258).

Mr. Friday testified that after June of 1998, he noticed significant changes in his level of anxiety. He was anxious and paranoid. (October 23 Transcript, p. 260). He was suffering from these problems before June of 1998. (October 23 Transcript, p. 260). The owner was harassing him and caused him a great deal of anxiety. (October 23 Transcript, p. 261). After hearing the evidence of Mr. Friday's emotional distress, the trial judge made an "exparte" opinion that "I will not permit no award for intentional infliction of emotional distress, under these circumstances, can be granted, and the Court strikes that count at this time". ((October 23 Transcript, p. 284).

The Court also refused to allow the testimony of Sharon Smith ("Smith"). (October 24 Transcript, p. 4). Ms. Smith testified by proffer that in August of 1998, that she was at 6651 West Quaker Road to install a satellite dish for the Fridays. Ms. Batts, who did not own the property, saw them installing the dish and told the installer, Mr. Gilbert, that she did not hire him, and Mr. Gilbert walked off. Ms. Batts then came to the back of the truck where Ms. Smith was located and told Ms. Smith that "these people (the Fridays) did not belong in this community". The Fridays are African American, and the defendants are Caucasian Americans. (October 24 Transcript, p. 7).

Mrs. Friday testified that it cost the Fridays $10,000,00 for hotel fare, after they were illegally evicted from the property at 6651 West Quaker Road. (October 24 Transcript, p. 10). They spent $1,500.00 to move after they were illegally evicted from the property at 6651 West Quaker Road. When they were illegally evicted from the property, they lived in various hotels. They lived on Fort Lee, at a Flagship Hotel and at Howard Johnson's. (October 24 Transcript, p. 11). They spent at least one thousand dollars per month, and they continued to live in

hotels for six months. (October 24 Transcript, p. 11).

The Fridays moved into a home in November of 1999 for a purchase price of $99,000.00. (October 24 Transcript, p. 12). They obtained an 11 percent loan, and their mortgage payment is $1,034.00. (October 24 Transcript, p. 12). They continue to reside in that house. (October 24 Transcript, p. 13).

Attorney Thomas P. Cheeley ("Cheeley") is a real estate attorney who handled real estate transactions for the Fridays. (October 24 Transcript, p. 34). He represented them with respect to the purchase of Whalen Tract Seven. (October 24 Transcript, p. 34). He testified that the Fridays were financially ready to close and all documents necessary were prepared for closing. Attorney Cheeley testified that the deed of bargain and sale describes the land to be conveyed as 5.03 acres. (October 24 Transcript, p. 34). Ms. Watko signed the deed of bargain and sale. (October 24 Transcript, p. 38). Attorney Cheeley noticed that a discrepancy arose during the closing between the deed and the contract. Mr. Cheeley was aware that there were at least five acres to Whalen Tract Seven, so when he saw the survey provided at closing that stated that the property to be conveyed was 3.4 acres, it was his opinion that fraud and deception had transpired and that there was a discrepancy between the contract and the deed. (October 24 Transcript, p. 44). Attorney Cheeley attempted to contact Mr. Booth, the Realtor, but Mr. Booth was at a ball game. Attorney Thomas Cheeley would not permit the Fridays to close on the contract because of fraud.

Attorney Thomas P. Cheeley and Mr. Ben S. Booth met the next day, July 10, 1998, and Mr. Cheeley showed Mr. Booth the discrepancy and asked Mr. Booth "what in the world (Batts and Watko) were doing". (October 24 Transcript, p. 45). Mr. Booth had no response; he simply put his head down and

shook his head and left Attorney Cheeley's office. (October 24 Transcript, p. 46). Attorney Cheeley informed the mortgage lender. (October 24 Transcript, p. 47). Attorney Cheeley indicated that he had never been given a deed showing Whalen Tract Seven as 5.03 acres. (October 24 Transcript, p. 48). Mr. Cheeley had also received a survey dated July 1, 1998, which stated that the land to be conveyed was 3.4487 acres, and this again was not consistent with the contract. (October 24 Transcript, p. 67).

Michael Miller testified that he performed an appraisal of the property located at 6651 West Quaker Road. Mr. Miller performed the survey on June 12, 1998, and indicated that the property was based on 5.03 acres and not 3.4487 acres. Mr. Miller is on the Veteran's Administration Fee Panel List, and he was requested by the VA to do the appraisal. (October 24 Transcript, p. 74). In order to perform the appraisal, Mr. Miller went to the property itself. Mr. Miller also went to the courthouse and got information on the property through the tax assessment and through the record books. Then he found comparable sales to compare to arrive at a value. (October 24 Transcript, p. 75). Mr. Miller appraised the property at $202,000,00. (October 24 Transcript, p. 78).

Mr. Miller received a request from the VA and a request from First Advantage Federal Credit Union to conduct his appraisal. (October 24 Transcript, p. 78). The request stated that the property was in map book P; it did not give a page number, but it said Whalen Tract Seven and provided a grid number. (October 24 Transcript, p. 78). It also provided the address of the property. Mr. Miller also had the contract which stated Whalen Tract Seven. (October 24 Transcript, p. 78). When Mr. Miller looked at the plat book, he saw Whalen Tract Seven, which was 5.03 acres. (October 24 Transcript, p. 79).

When Mr. Miller placed the value on the property, he based it on Whalen Tract Seven, which was 5.03 acres. (October 24 Transcript, p. 79). The amount of $202,000.00 included the house and the 5.03 acres. (October 24 Transcript, p. 80). In his appraisal, Mr. Miller separated the site value from the value of the house. The land was appraised at $30,000,00. (October 24 Transcript, p. 80). Mr. Miller based this price on comparable sales of vacant land in the area. (October 24 Transcript, p. 81). If he had known the property was only 3.5 acres, the appraisal would have been $5,000 to $10,000 lower. (October 24 Transcript, p. 85).

At the close of the Fridays' evidence, counsel for Booth and Whittle and Roper moved to strike the evidence of fraud and breach of contract against her clients. Counsel for Watko and Batts also moved to strike the fraud and breach of contract counts against his clients. The Court granted the motions. None of the defendants came forward with evidence in their defense of the Fridays' claims. Counsel for Watko and Batts then proceeded to introduce evidence in the support of Watko and Batts' claim against the Fridays. Batts testified that on one occasion when Mr. Friday was inspecting the home with a contractor before the sale, she had a conversation with him in which she told him that the three-and-one-half acres being sold ended at the tree line. (October 24 Transcript, p. 136).

Batts testified that the rental fee to be paid by Mr. Friday was $50.00 per day until closing. The Fridays remained in the house from July 6, 1998, until July 1, 1999. (October 24 Transcript, p. 138). Ms. Batts, who was not the owner of the property, stated that she incurred expenses totaling $19,919.44 for mortgage, insurance, electric, repairs and upkeep from July 1, 1999, until August 2000. Ms. Batts chose August 2000 because she received her last bill after the house was sold in

August of 2000. (October 24 Transcript, p. 141). Ms. Batts also stated that she incurred damages of $200.00 for attorney's fees, $42.00 for the eviction notice, lost time from work of 54.5 hours @ $9.50 per hour. Ms. Batts did not work because she is on 100 percent disability for lupus disease, and the trial court was aware of this. Ms. Batts stated that she lost rent from the original rent agreement, $10.00 per week of which remained unpaid, totaling $1,189.00, deposit held by Whittle and Roper Real Estate Firm for Friday's security deposit, totaling $1,000.00, lost interest on equity from the sale of the house, which she claimed she could have invested in a CD for 7.5 percent interest for two full years, totaling $11,205.00). (October 24 Transcript, p. 143). The total expense, according to Ms. Batts, who did not own the property, was $37,683.19. Ms. Batts added $25,000 for attorney's fees for a grand total of $62,683.19. (October 24 Transcript, p. 144).

The property ultimately sold in August of 2000 for $202,000.00. (October 24 Transcript, p. 149). The trial court ruled that the jury could consider the mortgage and expense figure of $19,919.44, the rent owed totaling $1,189.00, as well as the attorney's fees totaling $25,200.00. This "exparte and racist" decision by the trial judge was devastating to the Fridays. The trial judge was aware that Ms. Batts did not own the property when he ruled that the jury could consider the mortgage and expense figure. This is exparte in every sense of the word. (October 24 Transcript, p. 172). The raw figure the Court decided upon was $46,189.00. (October 24 Transcript, p. 172).

The defendants each then renewed their motions to strike. (October 24 Transcript, p. 174). The trial judge struck the Fridays' fraud claims against all defendants on the basis of his "gut feeling" that the misrepresentation was the result only

of a mistake and that the property acreage of 3.5 acres was a "mistake". The law is based on that, the law, and not based on gut feeling. The trial judge erred in his decisions. (October 24 Transcript, p. 179). The trial judge allowed the matter to go to the jury on breach of contract claims against all parties because "the Court has already indicated in talking about the fraud counts that this may have been innocently done. This should not have been the judge's call, however, it was a jury decision. (October 24 Transcript, p. 179).

After closing arguments, the breach of contract claims were submitted to the jury, along with Ms. Batts', Ms. Watko's, Mr. Booth's and Whittle and Roper's Counterclaim. The jury returned a verdict against the Fridays and award Ms. Batts and Ms. Watko damages in the amount of $15,800.00. The Fridays pray the "Lord Jesus" intervene and work a miracle on their behalf.

As the jury walked out, Mr. Friday noted, for the first time, that he recognized one of the jurors. Mr. Friday stated that he had never seen juror Elwood Williams in the courtroom up close, but as he passed counsel table, he recognized Mr. Williams as an individual with whom he had been involved in heated discussions on two separate occasions. The first occasion was at the Fort Lee gymnasium approximately one year before the trial. At that time, Mr. Friday was shooting baskets in the gymnasium near Mr. Williams, when Mr. Friday's basketball accidentally struck Mr. Williams. The two men, situated approximately three feet apart, had "heated words" for about five minutes. (December 11 Hearing Transcript, p. 16). On another occasion, Mr. Friday encountered Mr. Williams as he entered the Commissary at Fort Lee, Virginia. Again, the two had heated words which lasted for approximately five minutes. (December 11

Transcript, p. 17). Mr. Friday noted that Mr. Williams is approximately 5'6" in height, weighs approximately 215 pounds, is about 55 years old and has a dark complexion. (December 11 Transcript, p. 18).

Mr. Friday noted that his view was blocked by the counter and the first bench was backward at the trial. Therefore, blocking his view. (December 11 Transcript, p. 20). Mr. Friday noted that at the time of the trial, he was located 15 to 20 feet away from Mr. Williams, but did not recognize him at that time. (December 11 Transcript, p. 20).

Gerald Dupree, an acquaintance of Mr. Friday's who has done work for him, testified that he witnessed the encounter at the Commissary. (December 11 Transcript, p. 24). Mr. Dupree stated that the man with whom Mr. Friday was arguing was between 50 and 60 years of age, stocky, with a dark complexion, a thin mustache and graying hair. (December 11 Transcript, p. 24).

The trial court denied the Fridays' motion for mistrial on the basis that (1) Elwood Williams was seated in seat number one on the far left n the jury box about 20 feet away from the plaintiffs' (2) that there was no obstruction between the juror and the plaintiffs on the day of the trial; (3) that no objection was made by the plaintiffs at any time after the voir dire or when the jury was seated; and (4) plaintiffs have failed to present evidence or misconduct which would justify granting a mistrial. (Order entered December 22, 2000).

## ASSIGNMENTS OF ERROR

I. The trial court erred in striking the Fridays' fraud claims because there was sufficient evidence that Booth, Watko and Batts concocted, conspired and collaborated to deceive the Fridays. Each Respondent intentionally and knowingly made a

false representation as to the acreage of the property they intended to sell, with an intent to mislead the Fridays, and that the Fridays relied upon the misrepresentation and incurred damage as a result. At the very least, the evidence was sufficient to show constructive fraud on the part of each of the defendants, and the trial judge therefore erred in refusing to submit the fraud claims to the jury. For the meaning of "fraudulent" under 10(b), the Eighth Circuit looked to Chiarella. See 92 F. 3d, at 625. In that case, the Eighth Circuit recounted, this court held that a failure to disclose information could be "fraudulent" under 10(b) only when there was a duty to speak arising out of "'a fiduciary or other similar relationship, of trust and confidence'". Chiarella, 445 U.S., at 228 (quoting Restatement (second) of torts 551 (2) (a) (1976).

II. The trial court erred in refusing to allow the testimony of Sharon Smith, who is a Caucasian American. Ms. Smith testified that respondent Batts, who did not own the property in the first place, made a racist statement that "these people did not belong out here". Ms. Smith also testified on the issue of actual fraud, which was also denied.

III. The trial court erred in refusing to allow Mr. Friday to testify as to his pre-existing bipolar condition, and in striking Mr. Friday's claim for intentional infliction of emotional distress. Mr. Friday is a 100 percent Disabled American Veteran, who served his country well for 15 years in the United States Army. Mr. Friday is a credit to himself, his family and the country he loves and served so well.

IV. The trial court erred in striking the Fridays' punitive damage claim because the actions of the defendants were so egregious that a reasonable jury could have found that punitive damages were warranted. It was not the duty of the trial judge to make that decision, this was an error.

V. The trial court erred in allowing the jury, on Whittle and Roper Real Estate Firm, Ms. Batts, who did not own the property, Ms. Watko and Mr. Ben S. Booth's Counterclaim against the Fridays, to consider attorneys' fees incurred by the defendants, each defendant failed to identify a specific statutory grant of authority or contractual provision that would have enabled a Court to award them attorney's fees.

VI. The trial court erred in awarding attorney's fees to counsel for Ms. Batts and Ms. Watko in the action they filed against the Fridays for unlawful detainer.

VII. The trial court erred in denying the Fridays' motion for mistrial on the basis that Juror Elwood Williams had previously been involved in two heated exchanges with Mr. Friday.

VIII. The trial court erred in permitting defendant Batts: (1) to sell property that she did not own and (2) to act in stead of any other defendants without a power of attorney.

## QUESTIONS PRESENTED

I. Whether the trial court erred in striking the Fridays' actual fraud claims where there was sufficient evidence that Whittle and Roper, Mr. Booth, Ms. Batts and Ms. Watko intentionally and knowingly made a false representation as to the acreage of the property they intended to sell, with an intent to mislead the Fridays, and that the Fridays relied upon the misrepresentation and incurred damage as a result. The trial court permitted all defendants to violate the law, when defendants were allowed to transfer property to the neighbors after the Fridays had signed the contract. Additionally, the trial court erred in refusing to permit evidence of constructive fraud to the jury. (Assignment of Error I).

II. Whether the trial court erred in refusing to allow the

testimony of Sharon Smith. The trial judge requested the jury to leave the courtroom, when Ms. Smith testified. Ms. Smith's testimony was not permitted on the issue of actual fraud. (Assignment of Error II).

III. Whether the trial court erred in refusing to allow Mr. Friday to testify as to his pre-existing bipolar condition, and in striking Mr. Friday's claim for intentional infliction of emotional distress. (Assignment of Error III).

IV. Whether the trial court erred in striking the Fridays' punitive damage claim where the actions of the defendants were so egregious that a reasonable jury could have found that punitive damages were warranted. (Assignment of Error IV).

V. Whether the trial court erred in allowing the jury, on Whittle and Roper, Ms. Batts, Ms. Watko and Mr. Booth's Counterclaim against the Fridays, to consider attorneys' fees incurred by all defendants, and all defendants failed to identify a specific statutory grant of authority or contractual provision that would enable any Court to award them attorney's fees. (Assignment of Error V).

VI. Whether the trial court erred in awarding attorney's fees to counsel for Ms. Batts and Ms. Watko in the action they filed against the Fridays for unlawful detainer. (Assignment of Error VI).

VII. Whether the trial court erred in denying the Fridays' motion for mistrial on the basis that Juror Elwood Williams had previously been involved in two heated exchanges with Mr. Friday. (Assignment of Error VII).

VII. Whether the trial court erred in permitting Ms. Thelma Batts to sell property which she did not own or act in stead of a defendant without a "Power of Attorney". (Assignment of Error VIII).

## PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

### Standard of Review

"When the sufficiency of a plaintiff's evidence is challenged by a motion to strike, the trial court should resolve any reasonable doubt as to the sufficiency of the evidence in plaintiff's favor and should grant the motion only when 'it is conclusively apparent that plaintiff has proven no cause of action against defendant", or when 'it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it". *O'Brien v. Everfast, Inc.,* 254 Va. 326, 329, 491 S.E.2d 712, 714 (1997) (quoting *Williams v. Vaughan,* 214 Va 307, 309, 199 S.E.2d 515, 517 (1973) (citations omitted). "A jury issue exists 'if there is conflict of the testimony on a material point, or if reasonably fair-minded [persons] may differ as to the conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony." *Id.* (quoting *State Farm Mutual Automobile Insurance Co. v. Davies,* 226 Va. 310, 319, 310 S.E.2d 167, 171 (1983) and *Hoover v. J. P. Neff & Son, Inc.,* 183 Va. 56, 62, 31 S.E.2d 265, 268 (1944)); see *Claycomb v. Didawick,* 256 Va 332, 505 S.E.2d 202 (1998); *Austin v. Shoney's, Inc.,* 254 Va 134, 138, 486 S.E.2d 285, 287 (1997).

When the sufficiency of a plaintiff's evidence is challenged by a motion to strike, a trial court must resolve all reasonable doubt as to the evidence's sufficiency in the plaintiff's favor and deny the motion unless it is conclusively apparent that the plaintiff has proved no cause of action. *Higgins v. Bowdoin,* 238 Va. 134, 141, 380 S.E.2d 904, 908 (1989); *Williams v. Vaughan,* 214 Va. 307, 309, 199 S.E.2d

515, 517 (1973). When a trial court strikes a plaintiff's evidence, an appellate court, in reviewing the ruling, must view the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. *West v. Critzer,* 238 Va. 356, 357, 383 S.E.2d 726, 727 (1989).

**I. The trial court erred in striking the Fridays' actual fraud claims because there was sufficient evidence that Booth, Watko and Batts intentionally and knowingly made a false representation as to the acreage of the property they intended to sell, with an intent to mislead the Fridays, and that the Fridays relied upon the misrepresentation and incurred damage as a result. At the very least, the evidence was sufficient to show constructive fraud on the part of each of the defendants, and the trial judge therefore erred in refusing to submit the fraud claims to the jury.**

To sustain a claim of actual fraud, the plaintiff must prove a false representation, of a material fact, made intentionally and knowingly, with intent to mislead, reliance by the party misled, and resulting damage. *Evaluation Research Corp. v. Alequin,* 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994).

In this case, when Booth showed the property to Mr. Friday, he told Mr. Friday not to be concerned about any boundary lines on the property because Whalen Tract Seven was the property being transferred. The purchase agreement referred to Whalen Tract Seven, and included no information concerning the acreage. At the time the contract was entered into, Whalen Tract Seven was a parcel of land containing 5.03 acres of land. The financing that the Fridays received was based on the description of the property as encompassing 5.03 acres of land. In addition, the appraisal that was performed pursuant to the loan was based on 5.03 acres of land.

There is no question that the acreage to be transferred is a material fact. Although Booth, Watko and Batts each knew that they intended to divide the parcel, they never informed the Fridays of this fact. Instead, Booth prepared a contract which described the property to be transferred as "Whalen Tract Seven", at a time when that tract included 5.03 acres of land. It was *after that contract was entered into* that these parties caused to be recorded a deed that divided the property such that only 3.5 acres would be transferred to the Fridays. These defendants never informed the Fridays that the property had been divided, despite the fact that the Fridays had entered into a contract that encompassed the entire parcel. A reasonable jury could have determined that this was an intentional and knowingly false representation. The fact the that contract provided that the land be transferred was Whalen Tract Seven, along with Booth's representation to Mr. Friday that he should not be concerned with any boundary lines, but should concentrate only on "Whalen Tract Seven", as well as the surreptitious manner in which these parties went about recording the deeds of gift and easement, could lead a reasonable jury to conclude that they intentionally misrepresented acreage to the Fridays. The Fridays relied upon this misrepresentation, and moved onto the property and incurred damage as a result. For these reasons, the trial court erred in finding that the representations by these parties were the result of a simple "mistake".

Even if sufficient evidence did not exist for actual fraud, there was sufficient evidence to show constructive fraud. In *Henderson v. Henderson,* 255 Va. 122, 126, 495 S.E.2d 496, 499 (1998), this Court stated as follows:

A finding of constructive fraud requires proof

> that a false representation of a material fact was made, innocently or negligently, and that the injured party suffered damage as a result of his reliance on the misrepresentation. . . . In addition, the evidence must show that the false representation was made so as to induce a reasonable person to believe it, with the intent that the person would act on this representation.

*Id.; see Evaluation Research Corp. v. Alequin,* 247 Va. 143, 148, 439 S.E.2d 387, 390 (1994) ("Constructive fraud differs from actual fraud in that the misrepresentation of material fact is not made with the intent to mislead, but is made innocently or negligently although resulting in damage to the one relying on it".)

This case is similar to *Prospect Development Co., Inc. v. Bershader,* 258 Va. 75, 515 S.E.2d 291 (1999). In that case, this Court held that the purchaser of real estate stated a cause of action for actual and constructive fraud where the seller orally represented to the purchaser that the land located adjacent to the property in question would not be developed. Similarly, here, Mr. Friday testified that when he asked Booth about the boundary lines of the property, Booth told him that he needed only to concern himself with Whalen Tract No. 7 which was the property being sold. Mr. Friday did not go out and measure the land, and he is not required to do so. Booth represented to him that the entire tract was for sale. Indeed, the contract itself made no reference to the acreage included; instead, it referred only to Whalen Tract No. 7. Even if Booth's representation was innocently made, and even if Batts did not intend to describe the property to be sold as Whalen Tract Seven in the contract, the Fridays relied on these representations to their

financial detriment. The acreage of the land is a material fact which was misrepresented by all of the defendants. While Booth and Batts testified that they had had conversations with Mr. Friday in which they stated that the sale was limited to 3.5 acres, the contract itself and Friday's testimony contradict that. It was for the jury to decide whether Booth and Batts so informed the Fridays, and it was therefore not within the province of the Court to take the fraud claims out of the jury's hands.

**II. The trial court erred in refusing to allow the testimony of Sharon Smith on the issue of intentional fraud.**

If allowed to testify, Sharon Smith would have provided testimony that Batts harbored deep resentment against the Fridays. When Smith arrived to install a satellite dish, Batts informed Smith that the Fridays did not belong there. Notably, the Fridays are African-American and Batts, Watko and Booth are white. This testimony went directly to the issue of the intentional actions on the part of Batts, Watko and Booth, who apparently did not wish to sell the property to an African-American family.

**III. The trial court erred in refusing to allow Mr. Friday to testify as to his pre-existing bipolar condition, and in striking Mr. Friday's claim for intentional infliction of emotional distress.**

As a general rule, in tort cases, absent accompanying physical harm or wanton and willful conduct, emotional distress damages are not recoverable. *Fairfax Hospital v. Curtis,* 254 Va. 437, 446, 492 S.E.2d 642 (1997); *Carstensen v. Chrisland Corp.,* 247 Va. 433, 446, 442 S.E.2d 660. 668 (1994); *Sea-Land Serv., Inc. v. O'Neal,* 224 Va. 343, 354, 297 S.E.2d 647, 653 (1982); *Womack v. Eldridge,* 215 Va. 338, 340, 210 S.E.2d 145, 147 (1974). Thus, where the alleged tort

is deliberate and accompanied by aggravating circumstances, damages for emotional distress may be recoverable in the absence of physical injury. *Johnson v. Marcel,* 251 Va. 58, 465, S.E.2d 815 (1996); *Peshine v. Shepperson,* 58 Va. 472, 486, (1867).

A cause of action will arise for emotional distress, unaccompanied by physical injury, provided the following elements are shown: (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that it offends against generally accepted standards of decency and morality; (3) there is a casual connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress is severe. *Russo v. White,* 241 Va. 23, 400 S.E.2d 160 (1990); *Womack v. Eldridge,* 215 Va. 338, 210 S.E.2d 145 (1974). The plaintiff must allege that the defendant intended his or her conduct and knew or should have known that emotional distress would likely result. *Ely v. Whitlock,* 238 Va. 670, 385 S.E.2d 893 (1989).

It is axiomatic that a defendant who causes injuries to a plaintiff with a pre-existing condition must take the plaintiff as he finds him. Although not responsible for the pre-existing condition itself, he is liable for any exacerbation of it caused by his tortious conduct. *Bradner v. Mitchell,* 234 Va. 483, 362 S.E.2d 718 (1987); *Ragsdale v. Jones,* 202 Va. 278, 282-83, 117 S.E.2d 114, 118 (1960).

Notably, this Court in *Womack* did not limit the cause of action to cases in which the defendant's actions were intended to inflict emotional distress on the plaintiff. Instead, the Court stated as follows:

> We adopt the view that a cause of action will lie

> for emotional distress, unaccompanied by physical injury, provided four elements are shown: One, the wrongdoer's conduct was intentional or reckless. This element is satisfied when the wrongdoer had the specific purpose of inflicting emotional distress *or where he intended his specific conduct and knew or should have know that emotional distress would likely result.* Two, the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality. This requirement is aimed at limiting frivolous suits and avoiding litigation in situations where only bad manners and mere hurt feelings are involved. Three, there was a casual connection between the wrongdoer's conduct and the emotional distress. Four, the emotional distress was severe.

*Id.* At 342, 210 S.E.2d at 148 (emphasis added); See *Jordan v. Shands,* 255 Va. 492, 499, 500 S.E.2d 215, 219 (1998); *Russo v. White,* 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991); *Ely v. Whitlock,* 238 Va. 670, 677, 385 S.E.2d 893, 897 (1989).

In this case, by intentionally misrepresenting the acreage of the property to be transferred, Watko, Batts and Booth caused severe emotional distress to Mr. Friday. Mr. Friday suffered from bipolar disorder, and the stress of the misrepresentation by these defendants severely exacerbated his condition. He was hospitalized on several occasions as a result. Regardless of whether these defendants intended to cause emotional distress to Mr. Friday, they intended their specific conduct, which brought about the exacerbation of his pre-existing illness. As such, a reasonable jury could have found

that Mr. Friday was entitled to recover on the basis of the defendants' intentional infliction of emotional distress. The trial court thus erred in refusing to allow Mr. Friday's testimony concerning his emotional state, and in striking his intentional infliction of emotional distress claims.

**IV. The trial court erred in striking the Fridays' punitive damage claim because the actions of the defendants were so egregious that a reasonable jury could have found that punitive damages were warranted.**

This Court has recognized that the purpose of punitive damages is to provide protection to the public; such damages serve as a punishment to the defendant, and as a warning and example to deter him and others from committing similar offenses. See *Huffman v. Love,* 245 Va. 311, 427 S.E.2d 357 (1993). If there is evidence of misconduct, actual malice or such recklessness or negligence as to evince a conscious disregard for the rights of others on the part of the defendant, the issue of punitive damages should be decided by the jury. *Hamilton Dev. Co. v. Broad Rock Club,* 248 Va. 40, 445 S.E.2d 140 (1994). It is therefore within the province of the jury to determine whether the defendants should be punished for their misconduct.

As the Supreme Court of Virginia stated in *Smith v. Litten,* 256 Va. 573, 507 S.E.2d 77 (1998), "if a tortfeasor's tort was intentional rather than negligent, i.e., deliberately committed with intent to harm the victim; or, if a tortfeasor's negligent act or omission in violation of the common law reflects malice, willful or wanton conduct, or a conscious disregard of the victim's common law rights; and if the evidence is sufficient to support an award of compensatory damages, the victim's right to punitive damages and the quantum thereof are jury questions".

*Id.* The case at bar meets each of these requirements. As discussed *supra*, the actions of each of these defendants was intentional. They misrepresented to the Fridays the acreage of the property to be sold, caused him to enter into a contract for the purchase of Whalen Tract Seven which included 5.03 acres of land, caused him to represent to his lender that the property encompassed 5.03 acres of land, caused him to leave his home and move into the property despite the misrepresentation and then, once there, sought to require him to agree to pay the same price for a piece of land that was 1.5 acres smaller than agreed. When the property was placed under contract, it was indeed 5.03 acres in size, and the defendants worked behind the Fridays' backs to transfer away 1.5 acres of the parcel. Under these circumstances, the issue of punitive damages should have been submitted to the jury, as the evidence was sufficient to show that the defendants acted with such actual malice, recklessness or negligence as to evince a conscious disregard for the rights of others.

**V. The trial court erred in allowing the jury, on Batts' and Watko's counterclaim against the Fridays, to consider attorneys' fees incurred by Batts and Watko because Batts and Watko failed to identify a specific statutory grant of authority or contractual provision that would enable a Court to award them attorneys' fees.**

Virginia adheres to the "American Rule" on the issue of attorney's fees. This Court repeatedly has stated that the "general rule in this Commonwealth is that int the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party". *Russell County Department of Social Services v. O'Quinn,* 259 Va. 139, 523 S.E.2d 492 (2000) (quoting *Prospect Development Co. v. Bershader,* 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999); *accord*

## CONCLUSION

For the foregoing reasons, Petitioners, George W. Friday and Paulette D. Friday, by way of Pro Se, respectfully request that the Supreme Court of the United States grant the Petitioners our Petition for Appeal.

Respectfully submitted,

GEORGE W. FRIDAY and
PAULETTE D. FRIDAY

Paulette D. Friday

Paulette D. Friday

George W. Friday

George W. Friday

George W. Friday and Paulette D. Friday, Pro Se.
P. O. Box 2864
Petersburg, Virginia 23804
(804) 919-8400

# Appendix

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# APPENDIX A

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Monday *the* 11th *day of* June, 2001.

George W. Friday, et al., Appellants,

against Record No. 010524

Circuit Court No. CL99-54

Ben S. Booth, et al., Appellees.

From the Circuit Court of Prince George County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Friday *the* 27th *day of* July, 2001.

George W. Friday, et al., Appellants,

against Record No. 010524

Circuit Court No. CL99-54

Ben S. Booth, et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 11th day of June, 2001 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

UNPUBLISHED

SUPREME COURT OF VIRGINIA

RICHMOND, VIRGINIA

GEORGE W. FRIDAY AND PAULETTE D. FRIDAY
Plaintiff-Appellee,

v. No. CL99-54

Whittle & Roper Realtor, Ben S. Booth, Mary Watko and Thelma Batts
Defendants-Appellants.

Appeal from the Supreme Court of Virginia
Richmond, Virginia
(CL99-54)

Submitted: June 11, 2001

Decided: July 27, 2001

Before the Supreme Court of Virginia.

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Affirmed by unpublished per curiam opinion.

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COUNSEL

Junipe W. Robinson, Richmond, Virginia

for Appellees. Justices of the Supreme Court of Virginia

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Unpublished opinions are not binding precedent in this circuit

# APPENDIX B

GEORGE W. FRIDAY Plaintiffs,
And
PAULETTE D. FRIDAY

v. Case Number CL99-54

MARY F. WATKO Defendants
THELMA WATKO BATTS
BEN S. BOOTH, III
And
WHITTLE & ROPER, INC., REALTORS

**ORDER**

**ON THIS DAY,** December 11, 2000, came the plaintiffs, George W. Friday, in person and by counsel, and Paulette Friday, by counsel, and the defendant, Thelma Watko Batts, in person and by her counsel; Whittle & Roper, Inc., Realtors and Ben S. Booth, III, by counsel, upon the plaintiffs' Motion for Mistrial based on the misconduct of a juror, namely Elwood Williams during the trial of October 23 and 24, 2000; and was argued ore tenus by all counsel.

The plaintiffs alleged in their Motion for a Mistrial that the plaintiff, George W. Friday, had had two confrontations approximately 12 to six months prior to the jury trial with the juror named Elwood Williams. That Elwood Williams did not acknowledge said confrontations with George W. Friday during the voir dire conducted by the court, the plaintiffs' counsel, nor counsel for either of the defendants.

The plaintiffs further allege that the plaintiff George W. Friday, did not recognize the juror, named Elwood Williams, until after the trial had been concluded and the jury had returned its verdict.

**UPON CONSIDERATION WHEREFORE,** the court is of the opinion that the plaintiffs' Motion for a Mistrial based on juror misconduct is denied.

The court states the following as its reasons for denying the plaintiffs' motion: (1) Elwood Williams was seated in seat number one (1) on the far left in the jury box about twenty (20) feet from the plaintiffs; (2) that there was no obstruction between the juror and the plaintiffs on the day of trial; (3) that no objection was made by the plaintiffs at any time after the voir dire or when the jury was seated; and (4) there has been no reason shown by the plaintiff, George W. Friday, why said plaintiff did not recognize the juror until after the verdict; it is

**ADJUDGED, ORDERED and DECREED** that the plaintiffs' motion is hereby denied and the verdict of the jury of October 24, 2000, is affirmed; it is

**ADJUDGED, ORDERED and DECREED** that each counsel of record shall be mailed a teste copy of this order.

DATE

JUDGE

# APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

GEORGE W. FRIDAY
AND
PAULETTE FRIDAY

Plaintiffs,

v.

Case Number: CL-99-54

MARY F. WATKO
THELMA WATKO BATTS
BEN S. BOOTH, III
AND
WHITTLE & ROPER, INC., Realtors

**ORDER**

**THIS DAY** came the plaintiffs, George W. Friday and Paulette Friday, on this motion to extend the filing time for their responses to the defendants' Motion for Summary Judgment and Motions In Limine; and was argued by all counsel of record.

**UPON CONSIDERATION WHEREFORE,** this court is of the opinion that the extension of time for the plaintiffs to file their responses to September 8, 2000, shall be granted; it is

**ADJUDGED, ORDERED and DECREED** that the plaintiffs shall be allowed an extension for the filing of its responses to the defendants' motion. Said extension shall be until September 8, 2000.

DATE:

JUDGE

I ASK FOR THIS:

Janipher W. Robinson
Robinson and Greene
2809 North Avenue
Suite 105
Richmond, Virginia 23222
(804) 321-1728

SEEN AND AGREED:

Deborah S. O'Toole
Cowan and Owens
1930 Huguenot Road
P. O. Box 35655
Richmond, Virginia 23235

Homer C. Eliades

Eliades and Eliades
P. O. Box 967
408 North Sixth Avenue
Hopewell, Virginia 23860

BISHOP KNOTT, JR., CLERK, HEREBY CERTIFY THAT THE DOCUMENT TO WHICH THIS AUTHENTICATION IS AFFIXED IS A TRUE COPY OF A RECORD IN THE PRINCE GEORGE CIRCUIT COURT, AND THAT I AM CUSTODIAN OF THAT RECORD.

Bishop Knott, Jr., Clerk

Date Clerk/Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE GEORGE COUNTY

GEORGE W. FRIDAY
AND
PAULETTE FRIDAY
Plaintiffs,

v.
Case Number: CL-99-54

MARY F. WATKO
THELMA WATKO BATTS
BEN S. BOOTH, III
AND
WHITTLE & ROPER, INC., Realtors
A Virginia Corporation

**ORDER**

On the 21st day of July, 2000, came the parties by counsel, to be heard on the Motion in Limine filed by the defendants, Mary F. Watko ("Watko") and Thelma Watko Batts ("Batts") to exclude certain evidence of the plaintiffs; and the Motion of the plaintiffs, George W. Friday ("Friday") and Paulette Friday ("Mrs. Friday") for a change of venue; and the Court heard argument of counsel.

After hearing argument of counsel, the plaintiffs' Motion for Change of Venue is denied. The Motion to Exclude Certain Evidence with regards to punitive and compensatory damages was also argued by counsel and the matter is continued. The Court requested counsel for the defendants, Watko and Batts, to file a Memorandum of Law in support of their Motion, and also requested counsel for defendants, Booth

and W & R, to file a Memorandum of Law, and will allow counsel for the plaintiff to respond to the Memorandum of Law filed by the defendants. Counsel for defendants shall file their Memorandum of Law by August 11, 2000, and counsel for the plaintiffs shall have until September 1, 2000, to file a response to defendants' Memorandum of Law.

Seen:

Homer C. Eliades, Esq.
Counsel for Defendants, Watko and Batts

Janipher W. Robinson, Esq.
Counsel for Plaintiffs

Deborah S. O'Toole, Esq.
Counsel for Defendants, Booth and W & R

ENTER THIS: / /

Judge

# APPENDIX D

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF PROFESSIONAL AND
OCCUPATIONAL REGULATION
3600 West Broad Street, Richmond, Virginia 23230-4917
Telephone: (804) 367-8500 TDD: (804) 367-9753
http://www.state.va.us./dpor

February 25, 2000

**FIRST CLASS MAIL - PROOF OF MAILING**

Mr. George W. Friday
21400 Trojan Woods
Petersburg, VA 23803

RE: File Number 99-01952
Benjamin S. Booth

Dear Mr. Friday:

On February 23, 2999, after the Informal Fact Finding Conference, Benjamin Booth entered into the enclosed consent order as a proposed settlement in this case.

The Real Estate Board will review the consent order at its next scheduled meeting on April 13, 2000. The meeting will be held at the above listed address at 9:00 a.m., fifth floor, conference room 5 West. The Board has the authority to accept, reject or amend the consent order. If the Board rejects the consent order, it may deter consideration of this matter until the next regularly scheduled Board meeting in order to obtain the entire record.

If you wish to appear before the Board, please notify

Karen W. O'Neal, Assistant Director at (804) 367-8552. You may appear and respond to the summary before the Board makes its final decision in this matter. You may not present any new evidence.

You may reach me at 804/367-2393 if you have any questions.

Sincerely,

Stacie Camden Payne
Legal Assistant
Enforcement Division
Post-Adjudication Section

Enclosure (Consent Order)
cc: Karen W. O'Neal, Assistant Director

**IN THE**

**COMMONWEALTH OF VIRGINIA**

**REAL ESTATE BOARD**

**IN RE:**

Benjamin S. Booth, III
Salesperson
Petersburg, Virginia

Case No. 99-01952

**CONSENT ORDER NO. 2000-0161**

Benjamin S. Booth, III ("Booth") is and was at all times material to this matter a licensed real estate salesperson (No. 02 25 037432) in Virginia.

As a result of this special licensed status, Booth recognizes and acknowledges that he is subject to and bound by the Regulations of the Real Estate Board (the Board), as well as by all other applicable Virginia laws.

A violation of these Regulations has been reported and investigated. These matters were considered on February 23, 2000, in a conference convened pursuant to Section 9-6.14:11, Code of Virginia. This conference was held in Richmond, Virginia, and was attended by Booth and his counsel, Deborah O'Toole, Esquire. Board Members Mary F. Sullivan and James T. Pappas presided.

**Regulation 6.1 of the Board's 1995 Regulations provides:**
**§ 6.1 Grounds for disciplinary action.** The board has the power to fine any licensee or registrant, and to suspend or revoke any license or registration issued under the provisions of Title 54.1, Chapter 21 of the Code of Virginia, and the regulations of the board, where the licensee has been found to have violated or cooperated with others in violating any provision of Title 54.1, Chapter 21 of the Code of Virginia, or any regulation of the board.

The Board's duly designated representative has found sufficient evidence to believe that:

**Count I**

On or about April 2, 1998, George Friday (Friday), as purchaser, and Thelma Batts (later changed to Mary F. Watko) (Watko), as seller, entered into a Residential Purchase Agreement for property located at Whelan Tract 7 in Prince George County, more commonly known as 6651 W. Quaker Road, through Whittle and Roper, by Booth, acting as a dual agent.

When the offer to purchase was made, Whelan Tract 7 consisted of 5 acres, however, only 3.5 acres were listed for sale. Information revealing the actual amount of acreage to be conveyed to Friday was not included in the contract by Booth.

Booth's actions in failing to include the complete terms and conditions of the real estate transaction in the purchase offer is in violation of the **Board's June 1995 Regulation 6.11.4.**

**Count II**

On or about July, 1998, the parties entered into a Virginia Association of Realtors Possession by Purchaser Agreement. The Agreement states the purchaser was to deposit with Whittle and Roper $1,000.00 to be held in escrow and applied to the cost of repairing any damages to the Property or the cleaning thereof in the event purchaser defaults in his or her obligations to purchase the property. The Agreement also states the sales contract deposit of $500.00 will be used as part of the $1,000.00. A $500.00 check dated July 4, 1998, was written to Whittle and Roper Realtors. The check never cleared the bank.

Booth stated with the verbal consent of both parties, the check was delivered to the closing attorney to be dispersed at settlement. This notice was not in writing. On May 5, 1999, the settlement attorney, Thomas P. Cheeley, stated to Investigator Janet Creamer, that he never received the $500.00 deposit for the early occupancy agreement.

Booth's failure to provide in a timely manner to all principals to the transaction WRITTEN notice of the material change to the transaction, is in violation of the **Board's June 1995 Regulation 6.12.2.**

Actions outlined above are in violation of the following Regulations of the Board and/or Statutes of the Code of Virginia:

**JUNE 1995 REGULATIONS**

**§ 6.11. Misrepresentations/omission.**

Actions constituting misrepresentation or omission, or both, include:

4. Failing to include the complete terms

and conditions of the real estate transaction in any lease or offer to purchase.

**§ 6.12. Delivery of instruments.**

Actions constituting improper delivery of instruments include:

2. Failing to provide in a timely manner to all principals to the transaction written notice of any material changes to the transaction.

By signature to this Consent Order, Booth acknowledges his understanding of the charges and allegations against him.

**Booth hereby admits the alleged violation(s) of the Board's Regulations as outlined above and consents to the imposition of the following sanctions by the Board:**

**Monetary penalties are assessed as follows:**

| | | |
|---|---|---|
| **Regulation 6.11.4** | **=** | **$1,000.00** |
| **Regulation 6.12.2** | **=** | **$1,000.00** |
| **Total** | **=** | **$2,000.00** |

**Booth agrees to pay $350.00 to the Board, its costs incurred in this matter.**

The monetary penalties and costs are to be paid within 30 days of the effective date of this consent order. Booth acknowledges the monetary penalties and costs are a debt to the Commonwealth and agrees that in the event of a default, or the

return of a check for insufficient funds, Booth will be responsible for a penalty fee of 10 percent and interest at the underpayment rate prescribed in Section 58.1-15 of the Code of Virginia, and for all reasonable administrative costs, collection fees or attorney's fees incurred in the collection of whatever funds are due.

**Failure to pay the monetary penalties and/or costs, or otherwise comply with all other terms of this Order within the specified time period, will result in the automatic suspension of Booth's license until such time as the monetary penalties and/or costs are paid or there is complete satisfactory compliance. Booth understands the right to have this suspension considered in an informal fact finding conference and/or formal hearing under 1950 Code of Virginia, as amended, §§ 9-6.14:11 and 9-6.14:12, respectively, but knowingly and voluntarily waives any rights to these proceedings.**

The effective date of this Order shall be the date of execution by the Board.

SEEN AND AGREED TO:

_____

Benjamin S. Booth, III Date

229-86-0039

Social Security Number/ Tax ID No. Date

COMMONWEALTH OF VIRGINIA

City/County of Richmond

Sworn and subscribed before me this 23rd day of February, 2000.

Notary Public

My commission expires: 07-31-2001.

SO ORDERED:

ENTERED this _____ day of _____, 2000.

REAL ESTATE BOARD

BY:

Joseph K. Funkhouser, II, Chairman

COPY TESTE:

Custodian of the Records

# APPENDIX E

PLAINTIFF'S
EXHIBIT
E

BOOK 446, PAGE 299

THIS DEED OF EASEMENT, made and entered into on April 10, 1998, by and between FRANK CHUDOBA and RUBY CHUDOBA, husband and wife, parties of the first part, and MARY F. WATKO, party of the second part.

WHEREAS, the Grantors are the owners of Lot 1, a Division of 89.14 acres of Land Known as The Whelan Property, Rives District, Prince George County, Virginia, upon which a 25 foot driveway is located which serves as an access for ingress and egress to Lots 2, 3, 4, 5, 6, 8 and 9, owned by other parties; and

WHEREAS, Mary F. Watko is the owner of Lot 7, a Division of 89.14 acres of Land Known as The Whelan Property, Rives District, Prince George County, Virginia, upon which a 25 foot driveway is located which serves as an access for ingress and egress to Lots 2, 3, 4, 5, 6, 8 and 9, owned by other parties; and

WHEREAS, the parties hereto desire to clarify their ownership rights to that certain 50' easement for ingress and egress as described in that certain plat entitled "Division of 89.14 Acres of Land Known as the Whelan Property, Rives District, Prince George County, Virginia", made by Charles C. Townes and Associates, C.E., dated February 1, 1983, revised on February

BOOK 446, PAGE 300

NOW, THEREFORE, WITNESSETH: That for and in

consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration, cash in hand paid by the party of the first part to the party of the second part, the receipt of which is hereby acknowledged, that the parties hereto hereby grant and convey, with GENERAL WARRANTY and ENGLISH COVENANTS OF TITLE, except as hereinafter set forth, unto the other a non-exclusive perpetual easement for ingress and egress, described as follows:

> A right-of-way for ingress and egress along a gravel driveway 25 feet in width leading from State Route 629, along the northeast line of Lot 1, and the Northwest line of Lot 7, said right of way being more particularly shown on that certain plat entitled "Division of 89.14 Acres of Land Known as the Whelan Property, Rives District, Prince George County, Virginia", made by Charles C. Townes and Associates, C.E., dated February 1, 1983, revised on February 22, 1983, revised again on September 3, 1985, the aforesaid plat being recorded in Plat book #18, at page 166, to which plat reference is hereby made for a more particular description of the easement.
>
> Being the same property conveyed to Frank Chuboda and Ruby Chuboda recorded in the aforesaid Clerk's office in Deed Book _____, at page _____. Being the same property conveyed to Mary F. Watko, unmarried, by deed from Thelma W. Jolly, unmarried, dated October 25, 1993, recorded in the aforesaid Clerk's office in Deed Book 375, page 405.
>
> This conveyance is made expressly subject to all restrictions, reservations, conditions, covenants and

easements of record affecting the aforesaid property to the extent that they may lawfully apply.

TO HAVE AND TO HOLD the said easements and facilities unto the parties hereto, their successors and assigns, in fee simple.

BOOK 446, PAGE 301

It is expressly agreed between the parties that Frank and Ruby Chudoba will, under no circumstances, be financially responsible for the maintenance and upkeep of any part of said easement, except and only if they utilize the above-described easement.

IN WITNESS WHEREOF, the parties have executed this Deed of Easement as of the date first mentioned above.

Frank Chudoba

Ruby Chudoba

Mary F. Watko

STATE OF VIRGINIA
City/County of Petersburg, to-wit:

The foregoing instrument was acknowledged before me this 10th day of April, 1998, by Frank Chudoba and Ruby Chudoba, husband and wife.

My commission expires: March 31, 2002

Notary Public

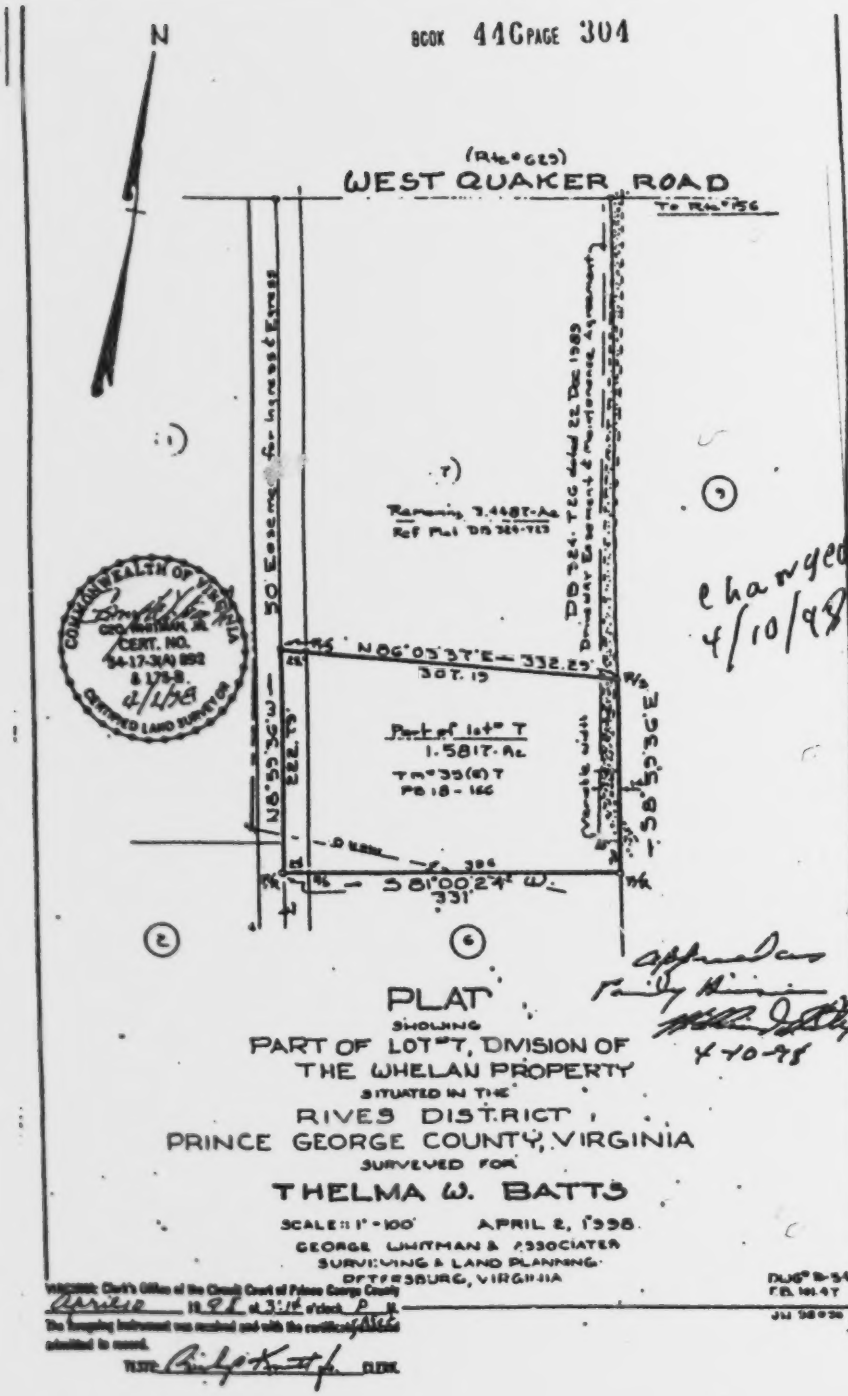
STATE OF VIRGINIA
City/County of Petersburg, to-wit:

The foregoing instrument was acknowledged before me this 10th day of April, 1998, by Mary F. Watko.

My commission expires: March 31, 2002

Notary Public

BOOK 446 PAGE 304




# PLAT

SHOWING

PART OF LOT "T", DIVISION OF
THE WHELAN PROPERTY

SITUATED IN THE

RIVES DISTRICT,
PRINCE GEORGE COUNTY, VIRGINIA

SURVEYED FOR

THELMA W. BATTS

SCALE: 1" = 100' APRIL 2, 1998

GEORGE LUMPKIN & ASSOCIATES
SURVEYING & LAND PLANNING
PETERSBURG, VIRGINIA

VIRGINIA: Clerk's Office of the Circuit Court of Prince George County
April 10 1998 at 3:14 o'clock P M
The foregoing instrument was received and with the certificate annexed admitted to record.
TESTE: [illegible] CLERK

PLAT B-54
FEB. 1998
JN 98030

BEST AVAILABLE COPY

# APPENDIX F

Prince George Circuit Court Docket

To: Whom It May Concern

From: Ray A. W. Brown

Subject: Case: Friday -v- Watko & Batts

Date: 23 & 24 October 2000

cc: Mr. & Mrs. George and Paulette Friday

The presiding Judge, Luke, tried Mr. and Mrs. Friday's case unjustly on 23 and 24 October 2000.

For two days, I watched the travesty of injustice carried out by the court against Mr. and Mrs. Friday. From the beginning, the evidence showed that the VA disclosure statement was in error and the responsibility and obligation by the realtor agent Mr. Booth failed to execute dual agent-ship to his buyer, Mr. and Mrs. Friday. Evidence clearly showed that Ms. Batts signed away the Deeds of Easement and the Deeds of Gift after the Fridays entered into contract for purchasing the property. The owner Ms. Watko should have signed the documents, not Ms. Batts. This was clearly an intention to fraud.

The Fridays' attorney, Ms. Robinson's empirical arguments were met with constant objections by opposing counsels. At times, it appeared that Judge Luke seemed very partial towards the defense's positions. Throughout the case, Ms. Robinson battled against two attorneys and a Judge. Judge Luke disallowed many things from evidence or consideration by the

jury. The jury was to consider mistake of material fact evidence, and should consider Fraud and Construction Fraud, but ruled out breach of contract issues, Judge Luke strikes. However, since the Judge ruled out breach of contract issues, Fraud, the evidence of Deeds of Easement and Deeds of Gift was not allowed as evidence for the Jury to consider, clever. In addition, Ms. Batts and Ms. Watko must be held accountable for the contents of the documents that they signed.

This case had no merit, and for those reasons listed above must warrants a mistrial.

Respectfully,

Ray A. W. Brown